single exercise. *R. R. Commission Cases* (1886) 116 U. S. 307; *Villavaso* v. *Barthet* (1887) 39 La. Ann. 247; *Rogers etc. Co.* v. *Fergus* (1899) 178 Ill. 571, affirmed 180 U. S. 624. Owing to two rules of construction, however, the difficulty arises in comparatively few cases. One rule is that the authority of a municipal corporation to make a contract surrendering its police power must either be express, or if implied, must be inferable of necessity. *Freeport Water Co.* v. *Freeport City* (1901) 180 U. S. 587; *Detroit Citizens' Street Ry. Co.* v. *Detroit Ry.* (1897) 171 U. S. 48. The other is that in order to find the existence of such a contract, the evidence of contractual intent on the part of the government must be so clear as to be susceptible of no other construction. *Knoxville Water Co.* v. *Knoxville* (1903) 189 U. S. 434; *Stanislaus County* v. *San Joaquin etc. Co.* (1904) 192 U. S. 201; *Ruggles* v. *Illinois* (1883) 108 U. S. 526. Provision for maxima rates may not, under this rule, suffice to establish a contractual right to charge up to the maximum. *Rogers etc. Co.* v. *Fergus, supra; Knoxville Water Co.* v. *Knoxville, supra.* A similar bulwark to the position of the government exists in the cases where exclusive franchises have been granted, since their validity has been often denied on the ground that they were monopolies, and hence that the State never could have intended to grant them. *Los Angeles etc. Co.* v. *Los Angeles, supra,* 732.

Two cases recently decided illustrate the operation of these rules of construction. In *City of Bessemer* v. *Bessemer Waterworks Co.* (Ala. 1907) 44 So. 663 the city had power to provide "by contract, ownership of waterworks, or otherwise" for a municipal water supply, and to regulate water rates. It was held that an accepted ordinance fixing the maxima rates for thirty years would be upheld against a subsequent ordinance reducing them. Here the proofs of the city's power and intention to contract were clear and convincing. On the other hand, in *Home etc. Co.* v. *Los Angeles* (Cal. 1907) 155 Fed. 544, the city's power to fix rates by contract was of dubious implication, and it was held that under the two rules above noted a contract was not made out from an accepted ordinance fixing maxima telephone rates for fifty years. A distinction is sometimes made between a city's power to fix and regulate rates, which is a governmental function, and its power to provide for works of public utility, in the exercise of which it acts in a corporate capacity; *Freeport Water Co.* v. *Freeport City, supra; Illinois etc. Bank* v. *Arkansas City* (1896) 76 Fed. 271; but this merely relieves contracts involving the latter power from the peculiar rules of construction applicable to alleged surrenders of governmental functions. *Illinois etc. Bank* v. *Arkansas City, supra,* 293. It does not, as apparently indicated in *Omaha Water Co.* v. *City of Omaha, supra,* 6, deprive a contract involving the exercise of both functions of its character as a suspension of the police power, in so far as rate-fixing provisions are concerned. Both the principal cases are properly decisive of this point, since in each a contract providing for a supply of public utilities and fixing rates was treated as a suspension of the police power.

ASPECTS OF THE MAXIM OF UNCLEAN HANDS.—The equitable maxim requiring "clean hands" of the complainant, being a universal guide for the granting of any equitable relief, the iniquitous conduct need not be proved

as an affirmative defense, *Simmons Medicine Co.* v. *Mansfield Drug Co.* (1893) 93 Tenn. 99, but will be considered by the court of its own motion. *Memphis Keeley Institute* v. *Keeley Co.* (1907) 155 Fed. 964. Such conduct may consist of actual fraud, *Bagwell* v. *Johnson* (1902) 116 Ga. 464, misrepresentation, *Cadman* v. *Horner* (1810) 18 Vesey 10, bad faith and sharp overreaching, *Michigan Pipe Co.* v. *Fremont etc. Co.* (1901) 111 Fed. 284, an artfully contrived snare, *Pope Mfg. Co.* v. *Gormully* (1891) 144 U. S. 224, or mere breach of a duty to speak. *Byars* v. *Stubbs* (1887) 85 Ala. 256; 2 Kent, Comm. 490. The complainant will be denied relief if he sues as the puppet of a rival company, *Forrest* v. *Manchester etc. Co.* (1861) 4 De G. F. & J. *125, but not if he sues *bona fide* in his own interest and merely his motives are questionable. *Rice* v. *Rockefeller* (1892) 134 N. Y. 174; *Hodge* v. *U. S. Steel Corporation* (1902) 64 N. J. Eq. 111; cf. *Mutter* v. *E. & M. Ry. Co.* (1888) 38 Ch. Div. 92. There is a dearth of authority as to whether the fraud of an agent may be imputed to his principal, so as to make the latter's hands unclean. Clearly if he has, or reasonably should have, knowledge of the fraud his hands are unclean, even though such knowledge be gained at the trial. *Rosenberg* v. *Haggerty* (1907) 38 N. Y. Law. Jour. No. 51. When he is innocent, however, it may be said, as in New Jersey, see the principal case, *post*, that since his moral standing is unimpeachable, he has a clear call upon a court of conscience, the limitation as to unclean hands being purely a personal bar. The answer to this is found in the undeniable modern tendency to extend the principal's responsibility in all respects, the practical disadvantage of ignoring the agent's conscience (cf. the case of corporations, Pomeroy, Contracts, Sec. 278) and the logic, under the recognized theories of agency, of terming the principal's status unconscionable. *Com'l Bank* v. *Burch* (1892) 141 Ill. 519. A strong supporting analogy is found in actions of deceit, which by the weight of authority, Burdick, Torts, 379, 380, are maintainable against an innocent principal for the frauds of his agent. Contra, *Kennedy* v. *McKay* (1881) 43 N. J. Law. 288. The doctrines of hardship and unclean hands are oftentimes confused. See Pomeroy, Eq. Jur. Sec. 400, citing *Willard* v. *Tayloe* (1869) 8 Wall. 557. The latter case involved hardship solely. The assertion of his right and the mere filing of the bill by the complainant do not soil his hands, unless he is actually guilty of a fraud or imposition on the court by claiming more than he should. *Camden Iron Works* v. *Camden* (1902) 64 N. J. Eq. 723; *Robinson* v. *Brooks* (1903) 31 Wash. 60. The doctrine of unclean hands looks primarily to the nature of the acts of the parties, that of hardship to the relative effects of a decree on the parties, taking into account not only their acts, but also collateral circumstances. See *Willard* v. *Tayloe, supra.* The latter, if not reasonably within the contemplation of both parties when they contracted, *Franklin etc. Co.* v. *Harrison* (1891) 145 U. S. 459, 473, may bar a decree because of hardship, but never, it is submitted, because of unclean hands. The question of unclean hands is in no way coextensive with the question of morality or ethics. See Sir Frederick Pollock in 4 COLUMBIA LAW REVIEW 25-27. For, on the one hand, a complainant's hands may be unclean though he acted in good faith, as in the case of a false representation; *Wall* v. *Stubbs* (1815) 1 Madd. Ch. 54; *Best* v. *Stow* (N. Y. 1845) 2 Sandf. Ch. 298; and on the other hand, immor-

ality and reprehensible conduct, *Dering* v. *Earl of Winchelsea* (1787) 1 Cox Eq. 318, or degraded character, *Wright* v. *Wright* (1893) 51 N. J. Eq. 475, do not make his hands unclean. Moreover, they do not affect the equities of the matter before the court. *Post* v. *Campbell* (1901) 110 Wis. 378.

This introduces a limitation on the operation of the maxim under discussion. Equity is not a general "avenger of wrongs." *Kinner* v. *Lake Shore Ry. Co.* (1903) 69 Oh. St. 339. The limitation is often expressed in the form that the iniquitous conduct must be connected with the subject matter of the suit, *Woodward* v. *Woodward, supra,* or have "a necessary relation to the equity sued for," *Dering* v. *Earl of Winchelsea, supra,* or be in the same transaction. *Trice* v. *Comstock* (1903) 121 Fed. 620; *Bateman* v. *Fargason* (1880) 4 Fed. 32. The statement of the rule shows its inevitable vagueness. Certainly the complainant should not be barred from relief simply because the right or thing he seeks to protect has been obtained by fraud. *American Ass'n Limited* v. *Innis* (1901) 109 Ky. 595; see *Trice* v. *Comstock, supra; Upchurch* v. *Anderson* (Tenn. 1898) 52 S. W. 917. Otherwise, the mere fact that a chattel or right was used fraudulently, even in a wholly unconnected transaction, would bar relief. *Hamilton* v. *Wood* (1893) 55 Minn. 482. Such, however, would be the logical result of the rule stated in some cases (as in the principal case in the lower court, *post*) that the relief will be denied if the very thing sought to be protected is itself an instrument of fraud. *Manhattan Medical Co.* v. *Wood* (1883) 108 U. S. 218; *Memphis Keeley Institute* v. *Keeley Co., supra; Hilson* v. *Foster* (1897) 80 Fed. 896. The true principle governing the cases last cited is that if the *user* sought to be protected constitutes a continuing fraud, as where labels have false matter on them, *Worden* v. *California Fig Syrup Co.* (1902) 187 U. S. 516, or where the copyright is itself a piracy, *Edward Thompson Co.* v. *American Law Book Co.* (1903) 122 Fed. 923, the complainant's hands are unclean. Of course, if the false matter is collateral to the subject of litigation, as where the false labels were upon a different product, *Shaver* v. *Heller* (1901) 108 Fed. 821, the limitation applies. *Brown & Allen* v. *Jacobs Pharmacy Co.* (1902) 115 Ga. 429; cf. *Mossler* v. *Jacobs* (1896) 66 Ill. App. 571; *Edward Thompson Co.* v. *American Law Book Co., supra.* In determining whether the plaintiff's acts affect the equities in litigation, two rules are important. First, the chronological order cannot be decisive. Failure to recognize this has led some courts into confusion. See *Brutsche* v. *Bowers* (1904) 122 Ia. 226. Secondly, the complainant's fraud need not necessarily be done to the defendant himself. *Pride* v. *Andrews* (1894) 51 Oh. St. 405; *Moore* v. *Jorden* (1887) 65 Miss. 229; *Tantum* v. *Miller* (N. J. 1858) 3 Stockton 551. Contra, *Chicago* v. *Stock Yards Co.* (1896) 164 Ill. 224, 238.

In a recent New Jersey decision, an injunction at the suit of an innocent principal was granted to protect a secret process which had itself been fraudulently obtained by an agent. The court below held, first, that the agent's fraud made the principal's hands unclean, and second, applying the "instrument of fraud" rule, that the fraud was in the same transaction. *Vulcan Detinning Co.* v. *American Can Co.* (1906) 70 N. J. Eq. 588. The court above reversed the decree on the first point and refrained from considering

the second. Id. (1907) 67 Atl. 399. The use of the process itself here constituted a continuing fraud and the case, therefore, falls within the class already discussed. The result reached in the lower court was consequently correct on both points, whereas its line of reasoning on the second point, and the result reached in the higher court on the first point, were erroneous.

ADMISSIBILITY OF SELF-SERVING CLAIMS OF TITLE.—In a recent case in Kansas, *Hubbard* v. *Cheney* (1907) 91 Pac. 793, there was a controversy between the heirs of a husband and wife as to whether a deed purporting to convey land to said husband and wife jointly was in fact a mortgage as to the wife. Self-serving declarations of the husband, made while in possession, were admitted "to illustrate and qualify the possession" and the court distinguished these from declarations of the wife which were admitted as against interest. In actions involving title possession may be a material fact as it is *prima facie* evidence of title, *Roebke* v. *Andrews* (1870) 26 Wis. 311, 317, or, as sometimes put, raises a "presumption" of title. Sedgwick & Wait, Trial of Title to Land, § 717; Best, Evid. § 366. As showing such possession the conduct or physical occupation or custody of the property is clearly admissible. The intent or frame of mind which accompanies the conduct is a part of it because it characterizes it and in such capacity becomes relevant and admissible. Words of claim of title evidence this frame of mind, and, since they are not offered as proof of the truth of the fact asserted, are clearly beyond application of the Hearsay Rule. Wigmore, Evid. § 1768. The conduct plus the words forms a "verbal act," Wigmore, Evid. § 1772, or as it is often stated, the words are a part of the *res gestæ*. *Bunnell* v. *Studebaker* (1882) 88 Ind. 338; Taylor, Evid. § 580 *et seq.* It follows that the utterance must be strictly concurrent in time with the conduct which it covers, and in this it differs from a statement admissible under the rule with regard to spontaneous utterances, for the latter are regarded as proof of the truth of the fact asserted and as exceptions to the Hearsay Rule, and hence it need not be synchronous with any physical conduct. Clearly also the words would not be admissible independently, for they could then be relevant only as hearsay. Many cases have overlooked the fact that claim of title by one in possession of property is part of the "verbal act" including occupation or custody and have excluded evidence of such claim as hearsay, not being a declaration against interest. *Waring* v. *Warren* (N. Y. 1806) 1 Johns. 340; *Fischer* v. *Bergson* (1874) 49 Cal. 294. Other decisions have repudiated the verbal act theory as applied to this class of cases on the ground that it is "receiving the unsworn declarations of the party in his own favor." *Holmes* v. *Sawtelle* (1865) 53 Me. 179; *Kyle's Adm'r* v. *Kyle* (1864) 15 Oh. St. 15; semble, *Ware* v. *Brookhouse* (1856) 7 Gray 454; *Roebke* v. *Andrews, supra* (dissenting opinion). But the great weight of authority upholds the theory, *Reiley* v. *Haynes* (1888) 38 Kan. 259; *Avery* v. *Clemons* (1847) 18 Conn. 306, 309; *Roebke* v. *Andrews, supra; Amick* v. *Young* (1873) 69 Ill. 542, 544, and at least two jurisdictions have abandoned opposing doctrines in its favor. *R. R. Co.* v. *Clark* (1878) 68 Mo. 371; *Lemmon* v. *Hartsook* (1883) 80 Mo. 13; cf. *Darrett* v. *Donnelly* (1866) 38 Mo. 492; *Criddle's Adm'r* v. *Criddle* (1855)